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| 10/698,799 | 10/31/2003 | Pradip Roy | 675000-658 | 2462 |

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| EXAMINER | |
|---|---|
| MAHAFKEY, KELLY J | |

| ART UNIT | PAPER NUMBER |
|---|---|
| 1761 | |

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/698,799 | ROY ET AL. | |
| | Examiner | Art Unit | |
| | Kelly Mahafkey | 1761 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *11/17/06, 3/1/07, & 3/26/06*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *1-45* is/are pending in the application.

4a) Of the above claim(s) *28-45* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-27* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

## DETAILED ACTION

Amendments made 11/17/06 and 3/1/07 have been entered.
Claims 1-45 remain pending; Claims 28-45 have been withdrawn from consideration.

### *Continued Examination Under 37 CFR 1.114*

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 3/1/07 has been entered.

### *Election/Restrictions*

Claims 28-45 have been withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 3/26/07.

### *Claim Rejections - 35 USC § 103*

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kepplinger et al (US 2002/0192345) in view of Zietlow et al (US 6432460). The references and rejection are incorporated herein and as cited in the office action mailed July 19, 2006. Regarding the new limitation of an extruded product, applicant is referred to Kepplinger, Abstract, in which Kepplinger teaches of an extruded product. Regarding the additional limitation of "said hexametaphosphate enhancing the rate of gelling of said aerated confection, such that said aerated confection gells to a cuttable mass within 6 minutes after extrusion..." applicant is referred to the previous rejection, Zietlow which teaches that addition of 0.15-10% calcium hexametaphosphate to an aerated confection. Zietlow teaches that calcium hexametaphosphate is a preferable

form of calcium to add to aerated confections (Column 7 lines 1-49). It would have been obvious to one of ordinary skill in the art at the time the invention was made to include 0.15-10% calcium hexametaphosphate in the aerated confection as taught by Kepplinger, in order to gain the notional benefits of the calcium. Furthermore, Zietlow teaches that the calcium component material "can have multiple functionality" (Column 6 lines 1-30), and one of ordinary skill in the art would expect the same ingredient, in the same amount, in a similar composition to function the same. Thus, one of ordinary skill in the art at the time the invention was made would expect the aerated confection with hexametaphosphate as taught by Kepplinger in view of Zietlow to enhance the rate of gelling of the aerated confection, such that said aerated confection gells to a cuttable mass within 6 minutes after extrusion, absent any clear and convincing arguments and/or evidence to the contrary.

Claims 1-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zietlow et al (US 6180158 B1) in view of Grettie (US 2196300).

Zietlow teaches of an extruded aerated confection (Abstract) comprising:

- 1-30%, preferably 1-4% of a film forming agent, including gelatin (Column 5 lines57-65);
- 1-30%, preferably 10-20% seed sugar (Column 6 lines 17-26);
- 0.2-0.5% color (Column 6 lines 49-50);
- Clear sugar syrup comprising corn syrup and concentrated fruit puree (Column 3 lines 30-41); and
- About 2-4% or about 5-15% moisture (Column 7 lines 43-65).

Since the only primary ingredients in the aerated confection as taught by Zietlow are the film forming agent, seed sugar, color, and clear sugar syrup, one would expect the aerated confection to contain about 25% (100-30-30-0.5-15 = about 25%)- 96% (100-1-1-.02-2 = about 96%) clear sugar syrup (wet basis), about 40% (100-30-30-0.5 = about 40%)- 98% (100-1-1-.02 = about 98%) clear sugar syrup (dry basis).

The clear sugar syrup as taught by Zietlow contains "1-30% (dry basis) of flavor carrying sugar supplied from fruit sources". Zietlow teaches that the clear sugar syrup comprises fruit puree concentrated. Fruit sugars are known fruit solids. Thus, the aerated confection as taught by Zietlow contains about 0.4%(40% sugar syrup*0.01)-30%(98% sugar syrup*0.30) fruit solids.

Note: Claim 11 is an optional limitation of claim 10 and is included herein since the limitations of claim 10 have been met without requiring the limitation of claim 11.

Zietlow, however, is silent to the aerated composition as including 0.01-0.2% hexametaphosphate as recited in claims 1 and 14, to the hexametaphosphate as enhancing the rate of gelling, such that the aerated confection gells to a cuttable mass within 6 minutes after extrusion as recited in claims 1 and 14, and to the evaporated fruit puree as concentrated to a solids level of greater than 80% as recited in claims 4 and 17.

Regarding the aerated composition as including 0.01-0.2% hexametaphosphate as recited in claims 1 and 14, Grettie teaches that aerated confections are lighter and more whippable with the addition of hexametaphosphate. Grettie teaches that 0.5-5% hexametaphosphate based on dry weight of gelatin, in the confection, is particularly effective (Column 2 lines 1-5 and 30-35). Zietlow teaches that the aerated confection includes 1-30%, preferably 1-4% gelatin (see above). Thus, one of ordinary skill in the art at the time the invention was made would have been motivated to include about 0% (1%gelatin*0.005)- 0.2%(4%gelatin*0.05) in the aerated composition as taught by Zietlow. One would have been motivated to do so in order to have a lighter and more desirable confectionary product.

Regarding the hexametaphosphate as enhancing the rate of gelling, such that the aerated confection gells to a cuttable mass within 6 minutes after extrusion as recited in claims 1 and 14, one of ordinary skill in the art would expect the same ingredient, in the same amount, in a similar composition to function the same. Thus, one of ordinary skill in the art at the time the invention was made would expect the aerated confection with hexametaphosphate Zietlow in view of Grettie to enhance the rate of gelling of the aerated confection, such that said aerated confection gells to a

cuttable mass within 6 minutes after extrusion, absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the evaporated fruit puree as concentrated to a solids level of greater than 80% as recited in claims 4 and 17, Zietlow teaches that 40-98% clear sugar syrup is added to the aerated confection. Zietlow teaches that the clear sugar syrup comprises concentrated fruit puree. Zietlow teaches that the fruit puree and the other sugar ingredients in the sugar syrup composition are evaporated to a moisture content of 8-12% (Column 3 line 5 through Column 4 line 10). Thus Zietlow teaches that the aerated confection contains evaporated fruit puree. Specifically regarding the concentrated fruit puree as containing greater than 80% solids, since the fruit puree is initially concentrated, and then further concentrated, one of ordinary skill in the art at the time the invention was made would expect the fruit puree to have a high solids content, such as greater than 80%. Furthermore, Zietlow teaches that when the sugar solution is combined with the other ingredients to form the aerated confection it has a moisture content of 8-12% (i.e. a solids content of 88-92%) and that the aerated confection has the same final moisture content as instantly claimed, thus, one of ordinary skill in the art at the time the invention was made would not expect the difference of the solid content in the dually concentrated fruit puree as taught by Zietlow to provide a patentable distinction to the instantly claimed invention, absent any clear and convincing arguments and/or evidence to the contrary.

***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422

F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 5-9, 12, 14-16, 18-22, 25, and 27 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5, 11-19, and 25-28 of copending Application No. 10/745129 ('129). Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant application claims an aerated confection with hexametaphosphate, dried fruit or particulate mater, seed sugar, film formers, flavoring, and coloring as does the '129 application. The only difference is the present application claims fruit solids and the '129 application claims dried fruit particulate material.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### *Response to Arguments*

Applicant's arguments filed 1/19/07 have been fully considered but they are not persuasive.

Applicant argues that the Zietlow does not teach hexametaphosphate as a gelling agent, applicant is referred to the rejections above which address this new limitation.

### *Conclusion*

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Kelly Mahafkey
Examiner
Art Unit 1761

KEITH HENDRICKS
PRIMARY EXAMINER